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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W. TW-A325
Washington, D.C. 20554

Re: **EX PARTE**
ET Docket No. 95-18

Dear Ms. Salas:

On behalf of the ICO USA Service Group ("TUSG"), this written *ex parte* presentation is submitted in the above-referenced proceeding involving the use of the 2 GHz bands for Mobile-Satellite Services ("MSS"). It responds to claims made by the Association for Maximum Service Television, Inc. ("AMSTV") and the National Association of Broadcasters ("NAB") in their recent *ex parte* submission dated July 12, 1999.¹

¹

Ex Parte Presentation of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters in ET Docket No. 95-18 (filed July 12, 1999) ("AMSTV/NAB Presentation").

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In their *ex parte* submission, AMSTV and NAB respond to earlier *ex parte* presentations made by ICO Global Communications ("ICO")² and the IUSG.³ In its presentation, ICO provided an economic analysis prepared by Charles River Associates Incorporated ("CRA").⁴ The CRA Analysis provides an economic evaluation supporting the conclusion that broadcast auxiliary service ("BAS") and fixed service ("FS") incumbents would be made whole by receiving compensation equal to not more than the value of the remaining useful life of their existing equipment.⁵ CRA arrived at this conclusion by relying principally on the law of takings under the Fifth Amendment.⁶

Similarly, the IUSG *ex parte* presentation contained supplementary materials to arguments set forth in earlier filings and in ICO's CRA *ex parte* submission. The IUSG agreed with the conclusions of the CRA Analysis and noted that an approach employing the depreciated value of equipment, advanced in the IUSG's comments and reply comments in this proceeding, could be employed as a surrogate for the remaining useful life concept set forth in the CRA Analysis.⁷ The IUSG also relied on long-standing judicial precedent based on the law of takings to arrive at this conclusion.⁸

² *Ex Parte* Presentation of ICO Global Communications in ET Docket No. 95-18 (filed June 18, 1999) (including an analysis dated June 18, 1999 and entitled "An Economic Analysis of Regulatory Takings and Just Compensation with an Application to Mobile Satellite Services") (the "CRA Analysis").

³ *See Ex Parte* Presentation of the ICO USA Service Group in ET Docket No. 95-18 (filed June 21, 1999) ("IUSG Presentation")

⁴ *See generally*, CRA Analysis.

⁵ *See* CRA Analysis at 11.

⁶ *See id.* at 2.

⁷ *See* IUSG Presentation at 2.

⁸ *See id.* at 3-5.

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In response, AMSTV and NAB now argue in their *ex parte* presentation that the law of torts applies rather than the law of takings.⁹ Herein, however, the IUSG demonstrates — as the Federal Communications Commission (“FCC” or “Commission”) has itself concluded — that the law of torts is the incorrect substantive law to apply in calculating the costs of relocating incumbents. Additionally, the IUSG shows that even if the law of torts were to apply, a careful review of the cases the AMSTV/NAB Presentation draws support from actually provides support for reimbursing the value of incumbents’ equipment based on the depreciated value of that equipment. Thus, under either the law of takings or under the law of torts, the real economic value of the equipment (or its depreciated equivalent) must be taken into account in calculating the incumbents’ relocation costs.

I. DISCUSSION

A. The Law of Takings Rather Than the Law of Torts Is the Correct Substantive Law to Apply To Calculate Relocation Costs.

AMSTV and NAB claim that, to be consistent with the goals of the Emerging Technologies¹⁰ proceedings, the law of torts is more appropriate than the law of takings to determine relocation compensation.¹¹ Not only is there no support offered for this assertion, the Commission has itself embraced the law of takings in instances where the property rights of its licensees are affected.

For example, the Commission, in valuing the compensation for the taking of an easement for an open video system operator to string its wires over public rights-of-way, stated that the proper measure is the decrease in the value of the public rights-of-way if they are crossed

⁹ See AMSTV/NAB Presentation at 3-4.

¹⁰ *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994), *aff’d*, *Ass’n of Public Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) (together, “Emerging Technologies”).

¹¹ See AMSTV/NAB Presentation at 3.

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by an additional wire.¹² The Commission then relied on the law of takings to determine what would be "just compensation."¹³ In this case, the FCC applied the "before and after" test used in partial takings cases and specifically cited court cases addressing takings of property.¹⁴ As another example, the Commission allowed non-carrier users to acquire indefeasible rights of user ("IRUs") in international submarine telephone cables and to require the current carrier owners of such cable to make IRUs available.¹⁵ In establishing this policy, the Commission used the formulation under the Fifth Amendment for "just compensation" since, in that case, the Commission was permitting the taking of private property for a valid public use.¹⁶

Finally, even in cases where the Commission has not found a taking when private property is interfered with, the Commission has acknowledged the concept of "just compensation" under the Fifth Amendment.¹⁷ For example, the Commission has embraced the

¹² See *Implementation of Section 302 of the Telecommunications Act of 1996 — Open Video Systems*, 11 FCC Rcd 18223, 18335 (¶ 221) (1996) ("OVC Second Report and Order").

¹³ See *id.*

¹⁴ See *id.* See also CRA Analysis at 7.

¹⁵ See *International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes*, 104 FCC 2d 208, 256-257 (¶ 64) (1986) ("IRUs Report and Order").

¹⁶ See *IRUs Report and Order*, 104 F.C.C. 2d at 217-18 (¶ 11).

¹⁷ See *Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rule Making*, 7 FCC Rcd 7369, 7477 (¶¶ 230-231) (1992) ("Expanded Interconnection Report and Order"), modified, *Bell Atlantic Tel. Com. v. FCC*, 24 F.3d 1441(1994); *Second Report and Third Notice of Proposed Rule Making*, 8 FCC Rcd 7374, 7445 (¶ 144) (1993) (together, "Interconnection Orders"). The Court of Appeals for the District of Columbia found that the physical co-location requirement imposed in the *Interconnection Orders* was in fact a "taking" that under the circumstances the Commission did not have the authority to impose. See *Bell Atlantic Tel. Co.*, 24 F.3d at 1447. The Commission, still discussing the law of takings, subsequently modified the *Interconnection Orders* to conform with *Bell Atlantic Tel. Com.* See *Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order*, 75 RR 2d 1040, 1052-53 (¶¶ 26-30) (1994).

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law of takings, and cited Supreme Court takings cases, to suggest that the Commission would apply such law in situations where there is total deprivation of property.¹⁸

In the instant proceeding — notwithstanding that BAS and FS incumbents have no “property” rights in the spectrum for which they have been licensed — the FCC’s relocation mandate does affect their rights to their respective 2 GHz facilities in order to pave the way for the introduction of new 2 GHz MSS services for the benefit of the public. This is analogous to the cases cited above where the Commission has applied the law of takings. Therefore, consistent with previous FCC cases and Supreme Court precedent, the law of takings — as described by CRA and the IUSG — is the correct approach to use to calculate maximum “just compensation.”

B. Even If the Law of Torts Were to Apply in the Context of Compensation for Relocated Incumbents, the Total Compensation Amount Would Have to Be Deducted By the Depreciated Amount of the Incumbents’ Equipment.

As stated above, in their *ex parte* submission, AMSTV and NAB assert, without legal support, that the goal of the Emerging Technologies proceedings of “ensuring that incumbents are no worse off than they would be if relocation were not required” is the same as the damages principle of tort law.¹⁹ This assertion is apparently based on the notion that the 2 GHz relocation will “damage” or “destroy” the utility of the existing BAS equipment.²⁰ Then the

¹⁸ See *Expanded Interconnection Report and Order*, 7 FCC Rcd at 7477 (¶ 231) (citing *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992) (“*Lucas*”). In *Lucas*, the Supreme Court makes clear that the Fifth Amendment is violated when regulations “den[y] an owner economically viable use of his land.” *Lucas*, 112 S.Ct. at 2894-95 (“We think, in short, that there are good reasons for our belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking”) (emphasis in the original).

¹⁹ See AMSTV/NAB Presentation at 4.

²⁰ See *id.*

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AMSTV and NAB submission relies on *Crown*²¹ and *Puget*²² for the notion that incumbents should get full replacement cost.²³ But the context in which these two cases, and like cases, arise is so different from the facts in this proceeding that no rational analysis can lead to applying their holdings — or for that matter, tort law — to this proceeding. Further, a careful reading of these cases indicates that depreciation is still to be taken into account under certain circumstances.

First, in *Crown*, U.S. Government owned surplus commodities were destroyed in a fire caused by a malfunctioning forklift designed and manufactured by Crown Corporation.²⁴ Crown Corporation stipulated to its liability for the fire and to the fact that the ignition of the fire was the proximate cause of the damage to the commodities (*i.e.*, negligence).²⁵ The court in *Crown* cited a number of cases where there was no market for the destroyed items as support for replacement cost (*i.e.*, there was no market for the affected item because the item was destroyed or damaged).²⁶ Similarly in *Puget*, “the issue presented [to the court] is the proper measure of damages for a negligently destroyed utility pole.”²⁷ And there was no market value for the pole.²⁸

The distinctions between the facts in *Crown/Puget* and the instant proceeding are so significant that these two cases have absolutely no bearing on this proceeding. First, and foremost, in this proceeding the FCC has mandated the relocation of 2 GHz incumbents to facilitate the provision of new MSS services that will ultimately benefit the public user. The

²¹ *United States v. Crown Equipment Corporation*, 86 F.3d 700 (7th Cir. 1996) (“*Crown*”).

²² *Puget Sound Power and Light Co. v. Strong*, 117 Wash. 2d 400; 816 P.2d 716; 1991 Wash. LEXIS 361 (Wash. S.Ct. 1991) (“*Puget*”).

²³ See AMSTV/NAB Presentation at 4.

²⁴ See *Crown*, 86 F.3d at 702.

²⁵ See *id.*

²⁶ See *id.*, 86 F.3d at 710.

²⁷ *Puget*, 816 P.2d at 716 (emphasis added).

²⁸ See *id.* at 718.

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relocation is the direct result of a Commission policy determination; it is not the result of any negligence by 2 GHz MSS entrants. If there is no negligence, tort law simply does not apply.²⁹

Nevertheless, even in tort cases, full replacement costs may be reduced by depreciation in certain cases. When replacement cost is allowed in lieu of the ordinary market value measure for damaged property, some courts hold "that replacement cost ordinarily may not be allowed in excess of the value of the goods at the time of the taking or destruction."³⁰ In such case, adjustment must be made to allow for the fact that replacement goods are worth more than the original.³¹ Indeed, when market value cannot be shown, courts will allow the use of depreciation to account for enhancement.³² Even when equipment is replaced, depreciation is used to avoid giving the plaintiff a windfall gain.³³

Also important as well, is what *Crown*, the cases cited in *Crown*, and *Puget* say about the use of full replacement cost for determinations of compensation. As an initial matter, *Crown* states that in the *corpus juris* of the several states, replacement cost is a permissible measure of the actual damages sustained when personal property is destroyed³⁴ — but *only* in certain circumstances as noted below. It is important to note that "permissible" does not make it mandatory. In fact, one of the cases cited by *Crown*, *Kansas Power and Light Co.*,³⁵ explains the

²⁹ The AMSTV/NAB Presentation also cites to Dan B. Dobbs, LAW OF REMEDIES (1993), as a source to show support for the replacement cost as an "appropriate" measure of damages. See AMSTV/NAB Presentation at 4 n.13. But, as shown below, even this source contemplates the use of depreciation to calculate replacement costs in order to avoid a windfall to the plaintiff. See Dan B. Dobbs, LAW OF REMEDIES, §5.13(1) at 546, §5.14(3) at 557, §5.14(3) at 557-559 (1993) ("Dobbs").

³⁰ Dobbs at §5.13(1) at 546.

³¹ See *id.*

³² See *id.* at §5.14(3) at 557.

³³ See *id.* at §5.14(3) at 557-559.

³⁴ See *Crown*, 86 F.3d at 710.

³⁵ *Kansas Power and Light Co. v. Thatcher*, 797 P.2d 162; 1990 Kan. App. LEXIS 625 (Kansas

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state of the law more clearly. The court in *Kansas Power and Light Co.* explained that there are two distinct lines of authority in the country regarding the amount that may be recovered for an item that has been destroyed.³⁶ The majority view holds that plaintiffs may recover the cost of replacement without reduction by depreciation, unless, as implied by the *Kansas Power and Light Co.* court, there is a life assigned to the equipment for tax and accounting purposes and there is a systematic program for replacing the equipment after a given number of years.³⁷ In such case, under the majority rule, depreciation is taken into account in calculating replacement costs.³⁸ The minority view simply holds that the plaintiffs may recover the cost of repairing or replacing, reducing that cost by depreciation.³⁹

Accordingly, even assuming arguendo that tort law applies to calculate relocation compensation costs, under the majority view of the cases that AMSTV and NAB have cited, if they assign a life to the facilities for tax and accounting purposes and they have a systematic program to replace their equipment after a number of years, the incumbents would only be entitled to replacement cost reduced by depreciation. Therefore, even under tort law, most incumbents — who utilize tax depreciation and plan for orderly equipment replacement — would still only be entitled the economic value of their equipment; that is, its remaining useful life.

II. CONCLUSION

In sum, AMSTV and NAB are incorrect in their claims — unsupported by any FCC case citation — that tort law should apply in this proceeding and that it mandates full replacement compensation costs. First, the FCC has in fact applied the law of takings in calculating compensation costs in other analogous proceedings. Second, the cases AMSTV and NAB cited for support of full replacement costs are significantly different from the facts in this

³⁵(...continued)

App. Ct. 1990) ("*Kansas Power and Light Co.*").

³⁶ See *Kansas Power and Light Co.*, 797 P.2d at 166.

³⁷ See *id.*, at 166-168.

³⁸ See *id.* (citing *Water Power v. Miller*, 52 Wash. App. 565, 571-72).

³⁹ See *id.*, at 166.

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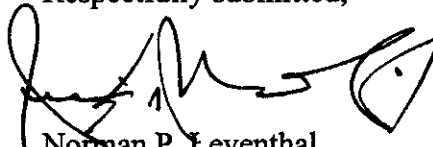
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proceeding. Unlike the underlying factors in those cases, there is no negligence on the part of the 2 GHz MSS entrants and the 2 GHz facilities of BAS and FS incumbents have not been "destroyed." Finally, even under tort law, depreciation is taken into account to avoid a windfall to the incumbents.

* * *

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, an original and one copy of this letter are provided to the Secretary for inclusion in the record.

Respectfully submitted,



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